(2)

FILED
APR 2 0 1995
OFFICE OF THE CLERK

No. 94-1576

In The

Supreme Court of the United States

October Term, 1994

KENNETH GOERING, ANN M. BOWEN,
LISA K. STRIMPLE-PADIOS and
EMILIE J. VOLQUARTSEN,

Petitioners,

v.

STATE OF NEBRASKA,

Respondent.

**Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Nebraska**

BRIEF IN OPPOSITION

RICHARD L. DUNNING
Assistant City Prosecutor
Hall of Justice 2-West
17th & Farnam St.
Omaha, NE 68183
(402) 444-5295

Attorney of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. WHETHER DEFENDANTS WHO ARE CHARGED WITH TWO OR MORE CRIMES CLASSIFIED AS PETTY WHO ARE EXPOSED TO MORE THAN SIX MONTHS IMPRISONMENT ARE ENTITLED TO A JURY TRIAL EVEN THOUGH STATE LAW LEGISLATES THAT THEY ARE NOT.

II. DO PETTY OFFENSES SUCH AS TRESPASS, REQUEST TO LEAVE, OBSTRUCTING THE ADMINISTRATION OF LAW THAT HAVE NO ADDITIONAL PENALTIES OR ONEROUS EFFECTS ELEVATE SUCH AN OFFENSE TO SERIOUS MERELY BECAUSE IT IS COMMITTED IN CONNECTION WITH A DEMONSTRATION WHERE NO WORDS, SIGNS, OR OTHER SYMBOLIC OBJECTS ARE INVOLVED.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

I. THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL WHEN A DEFENDANT IS CHARGED WITH TWO OR MORE PETTY OFFENSES EXPOSING HIM OR HER TO MORE THAN SIX MONTHS IN JAIL 2

II. THERE WAS NO INTERFERENCE OF THE PETITIONERS' EXERCISE OF FUNDAMENTAL RIGHTS WHEN CHARGED WITH PETTY CRIMES OF TRESPASS, REQUEST TO LEAVE AND OBSTRUCTING THE ADMINISTRATION OF LAW 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) 2

Blanton v. City of North Las Vegas, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989) 3, 4

U. S. v. Thomas, 574 F.Supp. 197 (D.D.C. 1983) 4

STATUTE

Neb. Rev. Stat. Sec. 25-2705 (Reissue 1989) 2

STATEMENT OF THE CASE

The Petitioners were charged with Trespass, Request to Leave, and Obstructing the Administration of Law. These are Omaha City Ordinances that carry a maximum of six months in jail and/or a $500 fine. The Petitioners were protesting the activities carried on at the Omaha Women's Clinic which, among other things, performs the early termination of pregnancies. The Clinic is a legal business complying with the laws of Nebraska and the City of Omaha. Others were protesting but in a legal manner and were not arrested. The Petitioners requested a jury before trial which was denied because the offenses were petty, and Nebraska law does not allow jury trials for city ordinances. The Petitioners were found guilty at a bench trial. Two of them were sentenced to ten days in jail, and the other two were fined $150 and court costs. The Respondent agrees with Petitioners' Statement of Facts concerning the appeals of their case.

REASONS FOR DENYING THE WRIT

The Court should deny certiorari for the reasons that the offenses involved are petty and the fact that the Defendants were exposed to more than six months in jail does not charge the nature of each individual offense. Nebraska law specifically denies a jury for these offenses which arise out of city ordinances. Granted that there are conflicting opinions with that of Nebraska the test should be how each state considers the seriousness of each crime. Also the certiorari should be denied because there were no First Amendment Rights involved in charges of

Trespass, Request to Leave, and Obstructing the Administration of Law.

I.

THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL WHEN A DEFENDANT IS CHARGED WITH TWO OR MORE PETTY OFFENSES EXPOSING HIM OR HER TO MORE THAN SIX MONTHS IN JAIL.

In determining whether a criminal offense is serious or petty, this Court held in *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970):

> that a possible six month penalty is short enough to permit a classification as petty . . . in fixing a maximum penalty for a crime a legislature includes within the crime itself a judgment about the seriousness of the crime . . . the judiciary should not substitute its judgment as to seriousness for that of a legislature which is far better equipped to perform the task and is likewise more responsive to changes and more amenable to recognition and correction of their misperceptions in this respect.

The Petitioners in this case were charged with city ordinance violations which each carry a maximum incarceration of six months. These crimes are classified as not serious but petty. Neb. Rev. Stat. Sec. 25-2705 (Reissue 1989) provides that "a party to any case in county court, except criminal cases arising under city or village ordinance . . . may demand a jury trial." The fact that a trial judge, after finding guilt, might impose sentences consecutively where more than one city ordinance is involved that could result in more than six months in jail does not

change the nature of each petty crime involved. The Nebraska Legislature and the Omaha City Council interpreting the views of society declared these Omaha City Ordinances as petty. The Nebraska Court of Appeals ruled correctly in not substituting its judgment for that of the two legislative branches. If someone were to receive more than six months on multiple charged ordinances, his or her avenue would be to appeal on the grounds that the sentence was excessive.

This Court held in *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), that petty crimes do not require jury trial unless there might be additional penalties attached to the six month jail maximum:

> This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in a rare situation where a legislature packs an offense it deems serious with onerous penalties that nonetheless do not puncture the six month incarceration line.

There are no attached or onerous penalties to crimes involved here. The fact that the three offenses were charged on three different complaints under one docket number as a procedural device exposing the Petitioners to more than six months in jail, does not meet the *Blanton*, supra, rule of additional penalties. The cases could have been filed separately and at different times. Trying them together does not alter or elevate the seriousness of the individual crimes.

While there are conflicting opinions around the country on this question, that is natural because each state legislature in enacting laws is reflecting on how society

views the seriousness of certain transgressions in their locals. The seriousness or lack of seriousness of crime should be measured by itself and not combined with conjecture of what a trial court might do when a defendant is found guilty of multiple petty offenses. This Court in *Baldwin,* supra, and *Blanton,* supra, has already ruled on this issue.

II.

THERE WAS NO INTERFERENCE OF THE PETITIONERS' EXERCISE OF FUNDAMENTAL RIGHTS WHEN CHARGED WITH PETTY CRIMES OF TRESPASS, REQUEST TO LEAVE, AND OBSTRUCTING THE ADMINISTRATION OF LAW.

The Petitioners claim that their First Amendment rights of free speech were interfered with in this case, and therefore, the petty crimes of which they were convicted were elevated to that of serious crimes. They use *U. S. v. Thomas,* 574 F.Supp. 197 (D.D.C. 1983) as their authority. In that case the defendant placed a cardboard missile on the sidewalk of the White House and even though he was charged with a petty crime, the Court held that it became a serious misdemeanor because it had a chilling effect on his future right to protest. In this case, the Petitioners had no signs, no objects, and were not saying anything. They were passive. Thus, no First Amendment rights or other fundamental rights were involved. There were no chilling effects resulting in Petitioners' convictions because the protests and demonstrations continued to this day.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

State of Nebraska,
Respondent

RICHARD L. DUNNING
Assistant City Prosecutor
Hall of Justice 2-West
17th & Farnam St.
Omaha, NE 68183
(402) 444-5295

Attorney for Respondent